

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No. 4:95-CR-41-8H
No. 4:17-CV-93-H

BARKLEY GARDNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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ORDER

This matter is before the court on petitioner's Motion for Relief from Judgment Pursuant to Rule 60.(b) (6), [D.E. #941] and Motion to Vacate under 28 U.S.C. § 2255, [D.E. #943]. These matters are ripe for adjudication.

In his motion for relief from judgment, petitioner attempts to set aside his criminal judgment in case number 4:95-CR-41-8H (E.D.N.C.) based upon Rule 60 of the Federal Rules of Civil Procedure. Petitioner's claims in his motion for relief from judgment are in substance a successive motion to vacate his sentence under 28 U.S.C. § 2255. See Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) (Courts may properly treat Rule 60(b) motion as a successive habeas petition). Similarly, petitioner's most recent motion to vacate under 28 U.S.C. § 2255, [D.E. #943], is successive.

Therefore, this court is without jurisdiction to consider either of these motions. See 28 U.S.C. § 2255(h). Accordingly,

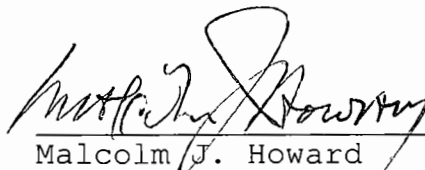
petitioner's motions to vacate, are DISMISSED WITHOUT PREJUDICE to his right to apply to the Fourth Circuit for leave to file a successive § 2255 motion. The court notes petitioner has sought such leave from the Fourth Circuit Court of Appeals and was previously denied.

CONCLUSION

For the foregoing reasons, petitioner's motions [DE #941, #943] are denied. The clerk is directed to close this case.

A certificate of appealability shall not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A petitioner satisfies this standard by demonstrating that reasonable jurists would find that an assessment of the constitutional claims is debatable and that any dispositive procedural ruling dismissing such claims is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). A reasonable jurist would not find this court's dismissal of petitioner's 28 U.S.C. § 2255 motion debatable. Therefore, a certificate of appealability is DENIED.

This 28th day of August 2017.



Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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